

**Letter of Findings Number: 04-20110124
Negligence Penalty
For the Years 2007 and 2008**

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ISSUE

I. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Illinois subcontractor to various prime contractors that perform machine drilling and boring work on construction projects. All projects that involve tangible personal property are billed on a lump sum basis. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2007 and 2008 which resulted in the assessment of use tax and negligence penalties. Taxpayer protested the assessment of tax and penalty.

During the course of reviewing the protest prior to hearing, the Department requested additional documentation from Taxpayer to support its protest. Taxpayer provided the requested documentation, including invoices, for the subject transactions. The Department's auditor reviewed this documentation and agreed that certain adjustments in favor of Taxpayer should be made. The auditor listed these "agreed to" adjustments in the Auditor's Protest Issues memo and an associated spreadsheet which were emailed to the individual who holds Taxpayer's Power of Attorney ("POA") on June 27, 2011.

Subsequently, in emails dated July 18, 2011, Taxpayer's POA stated that Taxpayer is now only protesting the penalty. Taxpayer waived the right to a hearing requesting that the Department's decision be made based on what was already in Taxpayer's file. Additional facts will be provided as necessary.

I. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the negligence penalty assessed on additional use tax the Department found Taxpayer owed pursuant to an audit by the Department.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Department's audit imposed penalty because ordinary business care and prudence requires that a taxpayer be aware of their tax obligations. Furthermore, Taxpayer was not even registered for sales and use tax purposes.

The Department's protest review process has removed a significant portion of the proposed assessment, however, regarding the balance of the assessment Taxpayer must demonstrate that it had reasonable cause for not paying the full amount of use tax due. In order to establish reasonable cause, Taxpayer must demonstrate that it exercised "ordinary business care and prudence" in conducting the duties from which the additional tax and penalty arose. [45 IAC 15-11-2\(c\)](#).

Taxpayer has not demonstrated that it had reasonable cause for not paying sales tax or remitting use tax on the remaining contested issues. Taxpayer, therefore, does not qualify for waiver of the negligence penalty.

FINDING

Taxpayer's protest of the negligence penalty is respectfully denied.

The Department will recalculate the assessment pursuant to the "agreed to" issues discussed in the "Statement of Facts" section of this Letter of Findings, and impose interest and penalty accordingly.

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